

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35640

DAVID TYLER HILL,)	2009 Unpublished Opinion No. 519
)	
Petitioner-Appellant,)	Filed: July 6, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed in part, reversed in part, and remanded.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

David Tyler Hill appeals from the district court's order summarily dismissing his application for post-conviction relief. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I.

FACTS AND PROCEDURE

Hill was originally charged with lewd conduct with a minor for having sexual intercourse with a fourteen-year-old girl. After negotiations, Hill entered a plea of guilty to an amended charge of sexual abuse of a child under sixteen. I.C. § 18-1506. At the sentencing hearing, Hill and his mother testified regarding Hill's mental health issues, the sexual abuse he suffered as a child, and his criminal history. Although Hill's attorney subpoenaed the psychologist who composed Hill's psychosexual evaluation to appear at sentencing, the psychologist was not

called to testify. Hill's primary contention at that hearing was that he did not force the victim to have intercourse with him and that the sex was consensual.

Hill filed an application for post-conviction relief and was appointed an attorney. In response, the state filed a motion for summary dismissal. The district court held a hearing on the state's motion and summarily dismissed Hill's application. Hill appeals.

II.

STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where

the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

III. ANALYSIS

A. Claim Dismissed without Notice

Hill's application for post-conviction relief contains a claim that his due process rights were violated because his sentence was based on uncharged, unreliable, and materially false information. The state's motion for summary dismissal did not address Hill's allegation of a sentencing due process violation. Similarly, the district court's order dismissing Hill's post-conviction application did not address this claim. Therefore, as conceded by the state, this claim must be remanded to the district court to comply with the notice required by I.C. § 19-4906. In remanding this claim, we express no opinion as to its merits.

B. Ineffective Assistance of Trial Counsel

Hill's application for post-conviction relief contained several allegations of ineffective assistance of trial counsel. The only admissible evidence offered by Hill to support his allegations is his affidavit. On appeal to this Court, Hill asserts the district court erred in summarily dismissing his claims of ineffective assistance of counsel because, "whether the allegations were conclusory or not," the "allegations are sufficient to raise a material fact issue, even if there is contrary evidence from the change of plea hearing itself."

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho

313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

Hill's first allegation is that he received ineffective assistance of counsel for his attorney's failure to conduct an adequate investigation. Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *Gee v. State*, 117 Idaho 107, 110, 785 P.2d 671, 674 (Ct. App. 1990). To prevail on a claim that counsel's performance was deficient in failing to interview witnesses, a defendant must establish that the inadequacies complained of would have made a difference in the outcome. *Id.* at 111, 785 P.2d at 675. It is not sufficient merely to allege that counsel may have discovered a weakness in the state's case. *Id.* We will not second-guess trial counsel in the particularities of trial preparation. *Id.*

Hill's application alleges that his attorney failed to conduct discovery, yet his affidavit concedes that he may be incorrect in this allegation. Hill's affidavit asserts that, even if his attorney did conduct adequate discovery, the attorney failed to share that information with Hill. This allegation is belied by the record from the change of plea hearing where Hill acknowledged having viewed the police reports as part of the discovery process. Hill's conclusory allegations are without admissible evidentiary support, are belied by the record, and do no more than merely allege that counsel may have discovered a weakness in the state's case. As such, they are insufficient to raise a genuine issue of material fact.

Hill's second allegation is that his trial counsel coerced him into pleading guilty. Although this allegation is addressed more thoroughly below in the context of ineffective assistance of appellate counsel, suffice it to say for now that the allegation is conclusory,

unsupported by admissible evidence, and belied by the record. The district court correctly denied Hill an evidentiary hearing on this issue.

Hill's final allegation is that his trial counsel performed deficiently at sentencing. Hill argues that his attorney should have more thoroughly explored his mental health issues, should have called the psychologist who performed Hill's psychosexual evaluation to testify, and failed to present him with a copy of the psychosexual evaluation. The sentencing transcript demonstrates that Hill's attorney spent time discussing Hill's mental health issues and Hill acknowledged that he read the presentence investigation report and that his attorney had reviewed the psychosexual evaluation with him. When asked at that hearing if Hill had sufficient time to review the psychosexual evaluation, he replied that he had.

Additionally, Hill's attorney subpoenaed the psychologist who conducted Hill's psychosexual evaluation. However, it is apparent from the transcript of the sentencing hearing that Hill's attorney contested several of the psychologist's conclusions and quotes. Hill's attorney attacked the psychosexual evaluation at sentencing as deficient, and Hill and his mother were called to testify to address some of those deficiencies. Hill has not shown that the decision not to call the psychologist was anything other than a tactical one. Finally, Hill failed to allege, much less make a prima facie showing, that he was actually prejudiced by any of his attorney's alleged deficiencies at sentencing. Therefore, these claims were properly summarily dismissed.

C. Claims that Could Have Been Raised on Direct Appeal

Hill's application for post-conviction relief contains claims of prosecutorial misconduct, judicial misconduct, and an invalid guilty plea. The state's motion sought summary dismissal of these claims because they were forfeited by Hill's failure to raise them on direct appeal. The district court agreed, dismissing these three claims pursuant to I.C. § 19-4901(b).

Idaho Code Section 19-4901(b) provides, in pertinent part, that "any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings." On appeal to this Court, Hill argues that these three claims were not forfeited because he "also alleged ineffective assistance of appellate counsel for not bringing them, which is a cognizable" post-conviction claim. The state contends that Hill's argument fails because his application did not allege these three claims in the context of ineffective assistance of appellate counsel. We agree.

Hill's application for post-conviction relief asserts the following claims: ineffective assistance of counsel, invalid guilty plea, due process violations during sentencing, prosecutorial misconduct, judicial misconduct, and ineffective assistance of appellate counsel. Hill elaborated on his claim of ineffective assistance of appellate counsel in the application, asserting that "appellate counsel disregarded [Hill's] wish to pursue ineffective assistance of counsel claim and coerced guilty plea claim" on appeal. Hill's affidavit in support of his application has one sentence that states: "I contend that any issue that could have been brought up on direct appeal but were [sic] not was due to the ineffective assistance of appellate counsel."

Hill's application alleges ineffective assistance of appellate counsel, invalid guilty plea, prosecutorial misconduct, and judicial misconduct all as separate claims. The section of Hill's application outlining his claim of ineffective assistance of appellate counsel only argues that Hill's appellate attorney was ineffective for failing to raise the issue of an allegedly invalid guilty plea. Furthermore, at the hearing on the state's motion to dismiss, Hill's post-conviction counsel never argued Hill's claim of ineffective assistance of appellate counsel and did not request that the district court analyze Hill's other claims of an invalid guilty plea, prosecutorial misconduct, or judicial misconduct also as ineffective assistance of appellate counsel claims.

Hill's *application* does not allege at least two of the three claims--judicial misconduct and prosecutorial misconduct--as violations of Hill's right to effective assistance of appellate counsel. Therefore, we decline to conclude that a single sentence buried in Hill's *affidavit* saves the claims of prosecutorial and judicial misconduct from forfeiture. However, because the application does allege that Hill's appellate counsel was ineffective for failure to raise a claim of an invalid guilty plea on direct appeal, we will review that claim as such. Accordingly, the district court did not err in summarily dismissing Hill's claims of prosecutorial and judicial misconduct for failure to raise those claims on direct appeal.

D. Ineffective Assistance of Appellate Counsel

As noted above, Hill's application contains a claim that he received ineffective assistance of appellate counsel because his appellate attorney failed to raise his claim of an invalid guilty plea on direct appeal. The state's motion asserts that this claim should be summarily dismissed because Hill's appellate attorney was not ineffective for failing to raise a claim on direct appeal that was belied by the record. The district court simply granted the state's motion for summary dismissal in its entirety.

An indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being the evidence of incompetence, is the hallmark of effective appellate advocacy. *Smith v. Murray*, 477 U.S. 527, 536 (1986). “Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel’s failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.” *Smith v. Robbins*, 528 U.S. 259, 288 (2000). Only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. *Id.*; *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

Hill’s primary argument in support of his claim of an invalid guilty plea is that his attorney coerced him into pleading guilty. To support his argument, Hill notes that he originally answered two questions on the guilty plea form affirmatively. However, Hill’s affirmative answers were explored by the district court, and Hill explained them without any reference to coercion. The following discussion occurred at the change of plea hearing:

THE COURT: Now, Mr. Hill, is this plea agreement acceptable to you?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you are not required to accept this plea agreement?

THE DEFENDANT: Yeah.

....

THE COURT: Okay. Are you pleading guilty because you believe you are guilty?

THE DEFENDANT: Yeah.

THE COURT: Now, Mr. Hill, as you sit here today do you have any questions about whether or not you should plead guilty?

THE DEFENDANT: No.

THE COURT: You had answered that question affirmatively originally. You had said yes, you do have questions.

THE DEFENDANT: Oh, I might have. I told my dad and my mom that I would talk to them first before I accepted anything, but I think they understand.

THE COURT: Now, do you feel that anyone, including your attorney, has pressured you into pleading guilty?

THE DEFENDANT: No.

THE COURT: You said yes to that question as well. Are you changing your answer to no?

THE DEFENDANT: Yeah, sorry. I didn’t mean to mark that.

THE COURT: Okay. I'll make a note on it. I've reviewed the rest of your answers on the guilty plea form. Do you still want to plead guilty?
THE DEFENDANT: Yeah.

Not only are Hill's allegations regarding an invalid guilty plea conclusory, they are belied by the transcript from his change of plea hearing. Furthermore, this issue is not "clearly stronger" than the issues raised by Hill's attorney on direct appeal. Consequently, the district court did not err in summarily dismissing Hill's allegation of ineffective assistance of appellate counsel for the reasons provided in the state's motion.

IV.

CONCLUSION

Hill did not receive the requisite notice before summary dismissal on his claim of a due process violation at sentencing. Therefore, the district court's order summarily dismissing that claim is reversed and that claim is remanded for further proceedings consistent with this opinion. Hill was provided with the requisite notice for the remainder of the claims in his application for post-conviction relief and has failed to demonstrate error in the district court's summary dismissal of those claims. Therefore, with the exception of Hill's claim regarding a due process violation at sentencing, the district court's order summarily dismissing Hill's application for post-conviction relief is affirmed. No costs or attorney fees are awarded to either party on appeal.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**